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No. 79-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

v.

BT INVESTMENT MANAGERS, INC., *et ano.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rule 41(b) of the Rules of this Court, the undersigned counsel for Appellees, BT Investment Managers, Inc. and Bankers Trust New York Corporation, moves for special leave to file the attached supplemental brief to bring to the attention of the Court § 712 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, which became law on March 31, 1980.

As is more fully explained in the attached brief, § 712 must be accorded effect in formulating the Court's judgment on one aspect of this case and bears implicitly on another.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE APPELLEES

I.

This case concerns the validity of Florida's legislative effort to exclude from the State both investment advisory and trust company subsidiaries of out-of-state bank holding companies, and out-of-state corporate fiduciaries.

The Court's decision depends in part on construction of the Bank Holding Company Act of 1956 (the "Act"), including § 3(d) thereof, 12 U.S.C. § 1842(d). Section 3(d) has been amended by § 712 of the Depository Institu-

tions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, which became law on March 31, 1980.

Section 712 provides as follows, in its entirety:

> "SEC. 712. (a) Section 5169 of the Revised Statutes (12 U.S.C. 27) is amended by adding at the end thereof the following: 'Notwithstanding the provisions of the preceding sentence, a national banking association the operations of which are limited as provided in the preceding sentence shall be deemed an additional bank within the contemplation of Section 3 of the Bank Holding Company Act of 1956.'
>
> "(b) Section 3(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(d)) is amended by inserting '(1)' after '(d)' and by adding at the end thereof the following:
>
> '(2)(A) Except as provided in subparagraph (B), the restrictions contained in paragraph (1) regarding the acquisition of shares or assets of, or interests in, an additional bank shall apply to the acquisition of shares or assets of, or interests in, a trust company.
>
> '(B) Subparagraph (A) shall not apply with respect to the acquisition of shares or assets of, or interests in, a trust company if such acquisition was approved by the Board on or before March 5, 1980, and if such trust company opened for business and was operating on or before March 5, 1980.
>
> '(C) For the purpose of this paragraph, the term 'trust company' means any company whose powers are limited to the powers specified in subsection (a) of the first section of the Act entitled "An Act to place authority over the trust powers of national banks in the Comptroller

> of the Currency", approved September 28, 1962 (12 U.S.C. 92a), for a national bank located in the same State in which such trust company is located.'.
>
> "(c) The amendments made by this section are hereby repealed on October 1, 1981."

II.

A. By enacting § 712 Congress has temporarily extended the prohibitions of § 3(d) to encompass new *trust company* subsidiaries of out-of-state bank holding companies, including appellee Bankers Trust New York Corporation, during the period from March 31, 1980 through September 30, 1981, but only during such period.

The brief of the New York Clearing House Association, *Amicus Curiae,* of December 19, 1979, referred at pages 17 and 18, footnote 19, to an earlier version of what became § 712 and observed that enactment of that version "would moot this action insofar as it concerns trust services." Unlike the earlier version, however, § 712 as enacted is repealed on October 1, 1981 by its own terms. Consequently, there still exists a controversy between the parties as to whether on and after October 1, 1981 Bankers Trust is entitled to do a trust business in Florida through a locally or federally incorporated subsidiary. That aspect of this seven year-old case is not moot, and Article III does not require the Court to defer a decision on the merits until Bankers Trust files another case and endures another period of protracted litigation.[1]

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[1] Congress does not intend that its imposition of a moratorium nullify pending applications to acquire trust company subsidiaries, thus requiring the filing of new applications after October 1, 1981. Only *approval* of applications is proscribed during the period; pending applications are to remain pending until the moratorium expires:

(footnote continued on following page)

B. The enactment of § 712 demonstrates Congress' understanding that without its terms the Act, as argued previously, neither precludes, nor consents to State legislation precluding, the conduct of an interstate trust business by bank holding companies through locally incorporated and regulated subsidiaries. Otherwise, § 712 would be superfluous and, indeed, would create an internally inconsistent statutory scheme. For example, if, as Florida argues, the statute previously precluded interstate trust companies without limitation, the repealer provision of § 712, which terminates on October 31, 1981 the moratorium on out-of-state trust company subsidiary acquisitions by bank holding companies, is nonsensical.

C. Section 712 does not apply at all to investment advisory subsidiaries of bank holding companies. Thus, the law is unchanged as to that aspect of the case. Section 712 is again relevant, however, as a manifestation of Congress' understanding that bank holding companies are permitted to operate interstate businesses except to the extent expressly precluded by the Bank Holding Company Act of 1956. The addition by § 712 of a specific preclusion of interstate trust company acquisitions for a limited period, and the absence from the Act of such a specific preclusion with respect to investment advisory subsidiaries, reinforce the conclusion that bank holding companies are not pro-

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(footnote continued from preceding page)

> "[U]nder no circumstances would any institution that has filed an application to establish a trust department in a state other than where it has its primary operation . . . have to file a new application during the period of the moratorium. In other words, a pending application remains pending throughout the period of the moratorium, and the moratorium only prohibits the approving of an application during the period of the moratorium." 126 CONG. REC. H2384 (daily ed. March 31, 1980) (remarks of Rep. St. Germain).

hibited by the Act from conducting an interstate investment advisory business through locally incorporated subsidiaries. Application of the doctrine of *expressio unius est exclusio alterius* permits no other conclusion. *See National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974); *Walla Walla* v. *Walla Walla Water Co.,* 172 U.S. 1, 22 (1898).

D. Section 712 does not extend the prohibitions of § 3(d) to the carrying-on of trust activities in Florida by out-of-state corporate fiduciaries. Thus, Congress has not consented, even temporarily, to the discrimination against out-of-state firms embodied in Florida Statutes § 660.10.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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